United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

June 10, 2008

VIA ELECTRONIC FILING

Secretary Marlene H. Dortch
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **CC Docket No. 02-6 (Appeal) – Request for Review**
Bureau of Indian Education, Billed Entity No. 21973; Form 471 Application No. 242742; Funding Requests No. 611227, 611234, 611237, 611240, 611243, 611244, *et seq.*

USAC Decision on Appeal – Funding Year 2001-2002, dated 4/11/08

Dear Madam Secretary,

This letter will serve as our Request for Review of the Universal Service Administrative Company's (USAC's) Decision on Appeal for Funding Year 2001-2002, dated April 11, 2008.

By "Notice of Commitment Adjustment Letter," dated June 29, 2007, USAC's Schools and Libraries Division (SLD) notified the Department of the Interior, Bureau of Indian Education (BIE) of potential violations of program rules due to allegedly incomplete documentation maintained by the Federal Government and demanded repayment of the entire $1,382,244 provided by SLD under the E-Rate program under Application No. 242742 (2001). By letter of August 28, 2007, BIE appealed USAC's June 29, 2007 "Adjustment Letter," providing copies of the pertinent GSA Federal Supply Schedule contract for the services provider (DRS Tamsco) in issue and related documentation. In spite of this, by letter of April 11, 2008, USAC denied BIE's appeal. Also, on April 14, 2008, USAC sent a "Demand Payment Letter" to BIE in which it advised that payment of the "balance of this debt is due within 30 days from the date of this letter" and that "[f]ailure to pay the debt within 30 days . . . could result in interest, late payment fees, administrative charges and implementation of the 'Red Light Rule.'" On May 9, 2008, we filed a protective notice with the FCC, challenging application of the "Red Light Rule" and generally objecting to the "continuation by SLD or FCC of these processes or sanctions with respect to BIE."[1] The basis for denial was that USAC had requested documentation created during the evaluation period, such as bid evaluation sheets, providing evidence of how the

[1] Early this month, an attorney in your office placed a courtesy call to our office, advising of the upcoming appeal deadline. She also advised that USAC was not intending to apply the "Red Light Rule" to BIE.

selected vendors were chosen. Because this documentation allegedly "was not provided," USAC denied the appeal, stating that BIE had failed to provide evidence that USAC erred in its initial decision and advised of the 60-day period for appeal to the Federal Communications Commission (FCC). This "Request for Review" is the agency's timely appeal from actions of USAC, including its denial of BIE's appeal.

For the reasons stated herein, BIE contends that USAC's repayment demand upon BIE, and subsequent denial of BIE's appeal, was both improper as a matter of interagency comity (as prescribed by regulation) and substantively unfounded. In that we contend that another agency of the Federal Government—a bureau of the United States Department of the Interior—cannot be subject to USAC's "Adjustment" action, our filing of this appeal should be considered a "special appearance." By filing this protective appeal, including addressing the merits of USAC's action, the Department is not intending to waive any available procedural or jurisdictional argument.

I. The FCC's Regulations Define "Claim" and "Debt" in a Manner That Excludes the Federal Agencies

The relevant regulations are found at 47 CFR §§ 1.1901 *et seq*. We note that the terms "claim" and "debt" mean "money, funds or property that has been determined by an agency official to be due to the United States from any person, organization, or entity, *except another Federal agency*." *See* 47 CFR § 1.1901(e)(emphasis added). Since BIE meets the definition of a "Federal agency," *by definition*, the regulatory framework for FCC's assertion or collection of a "claim" or "debt" is inapplicable to BIE. "Debt" is the operative term in USAC's proposed action with respect to BIE. Both USAC's June 29, 2007 and April 14, 2008 letters refer to the payment of "debt." FCC's own "Fifth Report and Order," 19 F.C.C.R. 15808, Aug. 13, 2004, at ¶ 32, "Administrative Limitations: Period for Audits or Other Investigations by the Commission or USAC"—which sets a five-year time frame for "audits or other investigations"— references the applicability of 47 CFR §§ 1.1901 *et seq* to "collect the debt once established." *Id.* at n. 55. If the FCC ultimately has no power—or, at least not this particular regulatory power—to collect such a "debt" vis-à-vis another Federal agency, this greatly casts into doubt whether it is wise or appropriate even to apply the highly technical procedures at 47 CFR §§ 54.500 *et seq* to establish such "debt" vis-à-vis another Federal agency.

To erase any lingering doubt, however, 47 CFR § 1.1902, *Exceptions*, directs that the FCC must "resolve interagency claims by negotiation in accordance with Executive Order 12146." *See* § 1.1902(e). That Executive Order provides, at 1-401, that: "Whenever two or more Executive agencies *are unable to resolve a legal dispute between them*, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General."[2] (Emphasis added) It is explicitly stated that the agencies first will "attempt to resolve a legal dispute between them" before ultimately turning to the good offices of the Office of Legal Counsel.

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[2] Although we have not completely developed the point here, the contrast between the FCC's competition requirements in which price or cost must be the paramount factor (*see*

Little additional narrative or explanation is required here. Between FCC having no clear means of enforcing a "debt" vis-à-vis another Federal agency and the same regulation directing the agencies to work to resolve disputes between them, BIE simply should not be subject to the time frames and constraints of the USAC and FCC appeal processes. To the extent that any disagreements remain, the agencies should informally meet to discuss their resolution.

II. USAC's Actions are Substantively Unfounded on a Number of Grounds

Time constraints associated with our timely filing this appeal do not permit us completely to develop arguments or positions of the agency; however, there are a number of key points we at least can allude to here. We would ask the right or ability to provide such supplemental filings or other information, formally or informally, as may be necessary or appropriate to assist with a substantive resolution in the context of this appeal should the FCC not adopt the entirely consultative approach that we contend is mandated by the pertinent regulations. We have reviewed a number of FCC's decisions, many in 2006 and 2007, that support giving latitude to BIE in these circumstances and reversing USAC. For example, USAC has not shown that there was any intention on the part of BIE to circumvent meaningful competition requirements.

USAC took action at virtually the last minute, which was prejudicial to BIE

The school year in question ended in 2001. If one views USAC's 2006 activities and communications as being the operative date, then USAC barely made the five-year limitation referenced in FCC's "Fifth Report and Order" for initiating audits or investigations. From a standpoint of fundamental fairness, however, BIE only received USAC's "Notice of Commitment Adjustment Letter" in June 2007. This was more than five years after the end of the school year in issue. It also was virtually at the end of any pertinent contract document retention period for a Federal agency. *See* Federal Acquisition Regulation, 48 CFR § 4.805. Regardless of whether it was technically timely, USAC's waiting until so long after BIE made a selection decision under the relevant FSS contract first to initiate an investigation and then take action was and is prejudicial to BIE.

BIE obtained the services under an established Federal contracting program that, even if different from, should satisfy FCC's "competition" requirements; Federal agencies should be accorded a presumption of regularity absent evidence to the contrary

FCC's own regulations recognize the existence of "Master" contracts. *See* § 54.500, "Definitions." The Government Accountability Office (GAO) has said of agencies' use of Federal Supply Schedule contracts that "[w]hen using these procedures, an agency is not required to issue a solicitation to request quotations, but rather may simply review vendors' schedules and, using business judgment to determine which vendors' goods or services represent the best value and meet the agency's needs at the lowest overall cost, may directly place an order under the corresponding vendor's FSS contract." *Metro Business Systems, LLC*, B-296371.2, July 13, 2005, 2005 CPD ¶ 136, citing FAR § 8.405-1. BIE used "business judgement" to determine that, under the circumstances in issue, DRS Tamsco offered the "best value" to the Government. An important point, however, is that—whether or not BIE now can satisfy USAC

that this decision was fully or properly documented—any order off the GSA FSS was from a contractor that GSA had vetted as offering both a fundamentally fair price for the services and as being "responsible"—possessing the fundamental capability to perform the work. The FCC also should consider that, even in the absence of particular documentation, there is a well-established presumption that "in the absence of clear evidence to the contrary, it must be presumed that public officials . . . were acting conscientiously in the discharge of their duties." *See* B-175421, Oct. 19, 1972, 1972 U.S. Comp. Gen. LEXIS 1763. That is, officers are accorded a "presumption of regularity" in the discharge of their official duties absent "clear evidence of error." *See* B-184237, Nov. 28, 1975, 1975 U.S. Comp. Gen. LEXIS 1494.

III. Conclusion

For all of these reasons, we respectfully request that, if the FCC does not adopt the consultative, interagency approach to resolution that we contend is mandated by its own regulations (thereby also rejecting or reversing USAC's purported actions with respect to BIE), that it grant our request for review of USAC's decision and overrule USAC's action on the merits.

Sincerely,

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